NO. 82-5335

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

KERMIT SMITH, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of Kermit Smith, Jr.

CITATION TO OPINION BELOW

Kermit Smith, Jr. was tried, convicted, and received a sentence of death in the Superior Court of Halifax County. In an opinion reported in State v. Smith, ____ N.C. ____, 292 S.E. 2d 264 (1982), the Supreme Court of North Carolina found no error in the conviction and affirmed the judgment of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

I. SHOULD THIS COURT REVIEW THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF ITS STATE LAW WHICH IS CORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW?

STATEMENT OF THE CASE

On December 4, 1980, Kermit Smith, Jr. was arrested and charged with the murder of Whelette Collins. On December 8, 1980 Smith was indicted by the Grand Jury of Halifax County for the offenses of first degree murder of Whelette Collins, first degree rape of Whelette Collins, and armed robbery of Whelette Collins.

All these cases were consolidated for trial and tried at the April 27, 1981 session of the Superior Court of Halifax County.

The State presented evidence which, as summarized by the Supreme Court of North Carolina in the opinion below, showed the following:

"Three black girls, Whelette Collins (the victim), Dawn Killen and Yolanda Woods, were students and cheerleaders at Wesleyan College in Rocky Mount, North Carolina in December 1980. During the early evening hours of 3 December 1980, the girls cheered at a basketball game held in the college gymnasium. After the game was over, the girls left the gym and walked to Whelette Collins' automobile which was parked at a nearby campus lot. It was approximately 7:30 p.m. (The girls were still wearing their cheerleading uniforms.) The girls had just gotten into the car and were preparing to depart when the defendant, a young white male, suddenly appeared at a window and asked for a ride to the highway. They told this stranger that they were not going in the direction of the highway and refused his request. Defendant thereupon brandished what appeared to be a pistol and demanded

entrance into the vehicle.[1] He then got into the car, in the back seat behind the driver. He told the girls that he was an escaped convict and needed a lift to his getaway car. He also told them that they were simply 'at the wrong place at the wrong time.' Whelette Collins then proceeded to drive where defendant directed, as he continued to hold the gun in his hand.

The group eventually reached and stopped at the place where defendant's automobile was parked in some woods not far from campus. (They had been driving around for a while in what seemed to be circles.) Defendant took the key to the Collins' car and asked the girls if they had any money. Dawn Killen and Yolanda Woods replied that they did not have their handbags with them. Whelette Collins said she had 'a little bit.' Defendant ordered the girls to get out of the car. Dawn and Yolanda got down on the ground and began to pray. While they were doing so, they overheard a discussion between defendant and Whelette about the money. Defendant asked Whelette, 'is that all?' because she only had $7.00. Defendant then took the key to Whelette's car and told the girls to go to the other car. He explained that he was going to drive them to another location, about forty miles away, so he could have 'plenty of time to get away' before the police were notified. Defendant made Dawn and Yolanda get into the trunk of his car and, because there was not enough room for her there, told Whelette to lie face down on the back seat.

Defendant then drove the girls to a quarry pit in a heavily wooded area adjacent to the Roanoke River in Halifax

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[1]It was later discovered (and shown at trial) that this pistol could not fire a bullet and was not, therefore, a deadly weapon in reality. It was a blank .22 or "toy" pistol, similar to that used to start races, with mud in its barrel. The pistol's true character was not, of course, immediately apparent in the dark or to one unfamiliar with firearms.

County near Weldon, North Carolina. They arrived at this place at approximately 9:30 p.m.

Defendant told the girls that they would have to wait in this deserted spot with him until 'his friend' came with another car at 12:00 or 1:00. The girls were uncomfortable because it was extremely cold that night (below freezing). They were also very frightened because defendant kept telling them that 'his friend' would kill them if he discovered that defendant 'had taken all these people hostage.' Defendant also warned the girls that he might have to hurt them if they did not listen to him.

During the course of the evening, defendant forced Dawn and Yolanda to get back into the trunk of his car and shut it. He said he was going to show Whelette the way back to the highway. The girls in the trunk could hear defendant talking to Whelette. He was telling her that she was 'very pretty,' that he 'couldn't tell whether she was black or white or Italian because she was very fair' and that 'if they had met under different circumstances they might be friends or something like that.' The girls in the trunk then heard a scuffle and a frightened scream. Whelette yelled out and started running away. Defendant slammed the keys down on top of the trunk and said to its helpless occupants, 'I'll be right back.' Shortly thereafter, the two girls thought they heard the sounds of gunshots.

About an hour and a half later, Dawn and Yolanda heard someone crying. Whelette knocked on the trunk and asked her friends how they were. They said they were find and asked Whelette if <u>she</u> 'was all right.' Whelette replied, 'no, she wasn't all right.' Whelette was still crying, and her friends 'could hear the pain and everything in her voice.' Whelette asked defendant, 'why had he done this to her.' He said, 'you don't understand my motivation.' Whelette

then told defendant that she was cold and asked him to get a blanket out of the trunk for her. Defendant refused and told her that the other girls needed the blanket to keep warm. Whelette complained, however, that 'they have their clothes on and they have coats and I don't and I'm cold.' Defendant merely responded, 'your friends would get upset if they saw you standing here without any clothes on.' He then snickered and said to her, with a sadistic tone in his voice, 'I can put you out of your misery.' A while later, he told Whelette that they would go back to where he had thrown her clothes.

For over an hour, Dawn and Yolanda heard nothing but 'dreaded silence.' Defendant subsequently returned to the car and opened the trunk. He was alone. The girls inquired as to Whelette's whereabouts. Defendant told them that she had stopped at the quarry to use the bathroom. They called for her but received no reply. Defendant suggested that one of them go with him to look for Whelette. Dawn and Yolanda refused to do so unless both went, and they stayed in the trunk.

About twenty minutes later, defendant permitted the girls to get out of the trunk. He was 'shaking.' He told the girls that:

> None of this would have happened if [they] had had some checkbook or some money with [them], because he was cold and his family didn't have any money and didn't have any heat and he wanted - he really needed money, so thinking that he would realize it was around Christmas time, most college students have money to go home.

At this point, Dawn and Yolanda told defendant that they had money back in Rocky Mount. Defendant agreed to take them there to get it. The girls got in the car again, and defendant began to drive away. He did not, however, drive in the direction of the highway; instead, he drove them even deeper into the woods. When defendant stopped the car again, Yolanda

and Dawn attacked him with a straight pin and a lug wrench which they had concealed on their persons during their sojourn in the trunk. (During the struggle, the girls noticed that defendant was wet, particularly his pants.) Defendant told the girls that he was going to kill them. Yolanda, however, wrestled the gun from defendant's grasp and unsuccessfully tried to shoot him with it (see note 1, supra). The girls then ran away and hid in some nearby underbrush until daylight. (It was then 4:30 a.m. on 4 December 1980.) As they waited there, they heard a splash as defendant threw 'something into the water.' The girls did not see or hear their companion Whelette during this time.

At about 7:00 a.m., Dawn and Yolanda began to make their way out of the woods. When they reached the interstate highway, they flagged down a vehicle and told its driver their horrible story. Law enforcement officials were soon contacted (by 9:00 a.m.). The girls gave the officers the gun they had taken from defendant and described the place where they had been restrained throughout the night. The Sheriff of Halifax County, William Clarence Bailey, arranged for the girls to be transported to the area of a gravel pit on the Roanoke River with which he was familiar. The scene of the crimes was subsequently located.

Defendant was attempting to leave the area when the officers and witnesses arrived. He was bloody, his clothes were wet, water was running off of his hair, and he was barefoot. Dawn and Yolanda identified him as their assailant on the spot, and he was quickly apprehended and arrested.

As soon as defendant was in custody, police officers began searching the woods for Whelette Collins. Many items of evidence were found, including the victim's clothes, defendant's wet and bloody underwear, and two cement blocks

with blood, hair and skin on them. The nude body of Whelette Collins was recovered from a shallow pond. Her feet were jammed into a cement block. An autopsy was performed very soon thereafter which revealed the following. Live sperm were in the deceased's vaginal area, there were numerous lacerations and bruises about her face and body, and several of her ribs were fractured. The victim's skull was severely fractured in several places due to the force of blunt trauma to her head. There were also scratches and scrapes on the back of the body which indicated that it had been dragged on the ground. It was determined that Whelette Collins died as a result of the head injuries she had received and not from drowning. (There was no water in her lungs.)

Defendant was also searched by police officers shortly after his arrest. Seven dollars in currency and a ring were retrieved from his person. The ring belonged to Whelette Collins. No money was found in her clothing. Defendant was properly advised by the officers not to make any statement at that time. Despite these admonitions, however, defendant told them that: 'it won't even a real gun anyway. I was just trying to scare the girls...I think she was dead before I threw her in the pond anyway.'

Defendant offered no evidence at the guilt phase of his trial." 292 S.E. 2d at pp. 266-269.

The jury found Smith guilty of first degree murder, second degree rape, and common law robbery. A sentencing hearing was immediately held to determine what sentence Smith should receive for first degree murder.

"The State did not offer additional evidence at the sentencing hearing held pursuant to G.S. 15A-2000. However, four witnesses testified in defendant's behalf, including his father and two psychiatrists. In sum, the testimony of these witnesses tended to show the following. Defendant

was twenty-three years old, physically healthy, legally sane and very intelligent. However, defendant had 'antisocial personality,' a disorder in which 'the moral and acted principles of the mind are strongly perverted or depraved, the power of self-government is lost or greatly impaired and the individual is bound to be incapable...of conducting himself with decency and propriety in the business of life.' Because he was small in stature, defendant felt inferior, inadequate and mistreated. He had difficulty getting along with other people and did not have normal social relationships. He was maladjusted, did not respect the rights of others and often behaved as if he was trying to 'get back at the world.' He could not keep a job and had attempted suicide once. He had also been to prison for stealing and was homosexually assaulted and harassed there. Defendant had many sexual problems, which included aggressive fantasies, peeping and cross-dressing (impersonating a female), and he was 'extremely sensitive' to rejection by women. Both psychiatrists stated that, in their opinions, defendant was under the influence of an emotional disturbance at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was also impaired." 292 S.E. 2d at 269.

After presentation of this evidence, and arguments of counsel, the court instructed the jury. The court specifically instructed the jury that if the jury unanimously found from the evidence beyond a reasonable doubt that one or more aggravating circumstances existed at the time of the murder, that the aggravating circumstance or circumstances found outweighed the mitigating circumstances, and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then it was the jury's duty to return a recommendation of death.

The jury unanimously found beyond a reasonable doubt four statutory aggravating circumstances existed, that one mitigating circumstance existed, and that the aggravating circumstances outweighed any factors in mitigation. The jury then unanimously found beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty. Based upon their answers to these issues, the jury returned a sentence recommendation of death. The trial court then sentenced Smith to death. He also sentenced Smith to a term of not less than forty nor more than forty years imprisonment for the offense of second degree rape, and to a term of not less than ten years nor more than ten years imprisonment for the offense of common law robbery. The judge further ordered that the sentence in the common law robbery case run at the expiration of the sentence in the rape case. The defendant gave notice of appeal from all the convictions and sentences imposed. The Supreme Court of North Carolina granted the defendant's motion to bypass the Court of Appeals as to the robbery and rape cases so that all three cases could be consolidated for appellate review. The Supreme Court of North Carolina affirmed these convictions and the sentences imposed on June 2, 1982.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE SUPREME COURT OF NORTH CAROLINA INTERPRETED THE PROVISIONS OF G.S. 15A-2000 AS A MATTER OF STATE LAW AND THIS INTERPRETATION IS NOT REPUGNANT TO CONSTITUTIONAL PRINCIPLES.

The Supreme Court of North Carolina, in State v. Smith, supra; State v. Pinch, ____ N.C. ____, 292 S.E. 2d 203 (1982); and State v. Williams, ____ N.C. ____, 292 S.E. 2d 243 (1982) (all handed down on June 2, 1982) explicitly held what had been previously assumed concerning the proper reading of G.S. 15A-2000.[2] The Court construed the language of G.S. 15A-2000 (b) and (c) to require the trial court to charge the sentencing jury in a first degree murder case that if a jury found beyond a reasonable doubt that (1) one or more statutory aggravating circumstances existed, (2) that these aggravating circumstances were substantial enough to warrant the death penalty and (3) that the aggravating circumstances outweighed the mitigating circumstances, then the jury must recommend a sentence of death.

Smith had attacked the instructions given by the trial court in his case in the Supreme Court of North Carolina on the basis that the instructions violated his statutory rights under G.S. 15A-2000 and the United States Constitution since the instructions allegedly rendered the death penalty mandatory in violation of Woodson v. North Carolina, 428 U.S. 284 (1976); Furman v. Georgia, 408 U.S. 238 (1972); and Roberts v. Louisiana, 428 U.S. 325 (1976). (State court brief of Smith, p. 11). Now, realizing that a state may constitutionally require a recommendation of death upon the making of certain findings by the sentencer (Jurek v. Texas, 428 U.S. 262 (1976); Adams v. Texas, 448 U.S. 38 (1980),

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[2]North Carolina Pattern Instructions, Crim. §150.10 (Replacement, 1980). State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), cert. denied 448 U.S. 907 (1980), reh. denied 448 U.S. 918 (1980), cert. denied 102 S.Ct. 494 (1981), reh. denied 102 S.Ct. 693 (1981), habeas corpus petition dismissed sub nom. Barfield v. Harris, 540 F.Supp. 451 (E.D.N.C. 1982); State v. Martin, 303 N.C. 246, 278 S.E. 2d 214, cert. denied ___ U.S. ____, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); State v. Rook, 304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied ___ U.S. ____, 102 S.Ct. 1741, 72 L.Ed.2d.155 (1982).

Smith has shifted his ground. Instead of claiming a Federal question is presented because the State's interpretation of the North Carolina death penalty statute is unconstitutional - the claim made below - Smith now suggests that a Federal question for review exists for this Court because the Supreme Court of North Carolina allegedly misread Furman v. Georgia, supra and its progeny and felt bound, as a matter of Constitutional law, to construe G.S. 15A-2000 to require a death penalty recommendation if all the issues in G.S. 15A-2000(c) are answered affirmatively. If it were true that the Supreme Court of North Carolina had acted as it did solely because it misconstrued this Court's decisions, then a Federal question is presented: United Airlines v. Mahin, 410 U.S. 623 (1973). However, a fair and complete reading of the portions of the Supreme Court of North Carolina's opinions dealing with this issue in State v. Pinch, supra; State v. Smith, supra; and State v. Williams, supra all reveal that the Supreme Court of North Carolina's construction of G.S. 15A-2000 to require a recommendation of death after certain findings are made was not based on a perceived constitutional requirement, but rather on a plain reading of the statute itself.

In State v. Pinch, supra, the case upon which State v. Williams, supra and State v. Smith, supra largely rely, the Court held that the instruction to the jury that they must return a recommendation of death if they found all three issues submitted to them for consideration was proper, since it was based on the statutory criteria set forth in G.S. 15A-2000(b) and (c). The Court went on to say that the jury could not be allowed to exercise unbridled discretion and disregard the findings it made pursuant to G.S. 15A-2000(c), but rather must exercise guided discretion within the "carefully defined set of statutory criteria" (292 S.E. 2d at 227).

The Court then cited State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979) to support the proposition that the jury may not be instructed to "disregard the procedure outlined by the legislature and impose the sanction of death at their own whim." 298 N.C. at 35, 257 S.E. 2d at 346. (emphasis added).

The North Carolina Supreme Court in Pinch construed G.S. 15A-2000. However, the thrust of the opinion in Pinch was not that the Supreme Court of North Carolina must, for constitutional reasons, construe its death penalty statute as it did, but rather, that the jury should not be allowed in making the sentencing decision to disregard the procedure outlined by the legislature. The Court's decisions in Pinch, Smith, and Williams nowhere state the North Carolina Supreme Court felt compelled by the Federal Constitution to interpret G.S. 15A-2000 as it did, but rather reiterate a plain reading of the statute required the result reached by the Court. In fact, in State v. Pinch, supra, the Court found it necessary to add a footnote citing Jurek v. Texas, supra for the proposition that the Supreme Court of North Carolina's construction of the statute in question is Constitutionally permissible. This alone clearly indicates that the Supreme Court of North Carolina was not interpreting its statute as it did due to some feeling of Federal Constitutional mandate. However, if there is any question as to the basis upon which the majority in Pinch interpreted the language of G.S. 15A-2000, that question is resolved by referring to the opinion below in this matter and the North Carolina Supreme Court's opinion in State v. Williams, supra. In the opinion below, the Supreme Court of North Carolina stated the instruction that the jury must return a verdict of death after making certain findings "comports with the procedure contemplated in G.S. 15A-2000(b)." 292 S.E. 2d at 275. In State v.

Williams, supra, the Court rejected the argument that the jury despite its findings made pursuant to G.S. 15A-2000(c) ought still be able to return a life sentence if it desired. The Court stated:

> "The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstances found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. 15A-2000(e) or elsewhere....G.S. 15A-2000(b) requires the jury to deliberate and render a sentence recommendation 'based upon' two consideration: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be 'based on these considerations'- not unbridled discretion. G.S. 15A-2000(b)(3). This specific mandate is clear - it requires no interpretation." 292 S.E. 2d at 263 (emphasis added)

Justice Exum, the lone dissenter in State v. Pinch, supra as well as the matter now before the Court, argued initially that the majority decided to construe the statute "as it did on the sole ground that otherwise the statute would be subject to constitutional attack." 292 S.E. 2d at 230. However, he then accused the majority of having fallen into the same logical trap in reading G.S. 15A-2000 to which he had previously succumbed when, in State v. Rook, supra he wrote that:

> "the clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances." 304 N.C. at 243, 283 S.E. 2d at 757.

As he proceeded further in the dissent, he argued that the majority in construing the statute based their construction on a misreading of State v. Goodman, supra and then, finally, while admitting under Jurek v. Texas, supra the majority's interpretation of the state statute would pass Constitutional muster, he claimed his new view of how the

statute should be read was more solidly supported by the decisions of the United States Supreme Court and is closer to the legislative intent of the North Carolina General Assembly.

While initially accusing the majority of deciding the statute due to a perceived constitutional compulsion, Justice Exum then asserted the majority construed the statute as they did due allegedly to reading the statute incorrectly as he had previously done and misreading state case law. Thus, the vast part of the dissent in Pinch, which Justice Exum adopted in his dissent in Smith and Williams reaffirms what the majority opinions in Pinch, Smith and Williams clearly show: That the statute in question was construed by the Supreme Court of North Carolina as a matter of state law. This Court must defer to the interpretation placed on a state statute by the highest state court where, as here, the interpretation is made solely as a matter of local law: Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Scripto v. Carson, 362 U.S. 207 (1960); c.f. Hankerson v. North Carolina, 432 U.S. 233, 244-245 (1977). The North Carolina Supreme Court's interpretation of the statute is not repugnant to Federal Constitutional mandates. Jurek v. Texas, supra. Therefore, this Court ought not issue its writ of certiorari to the Supreme Court of North Carolina since there is no Federal question here presented for review.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Kermit Smith, Jr.'s petition for writ of certiorari should be denied.

Respectfully submitted, this 1st day of October, 1982.

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CERTIFICATE OF SERVICE

I, Donald W. Stephens, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record for Petitioner Kermit Smith, Jr., by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Mr. Dwight L. Cranford
P.O. Drawer 40
200 Becker Drive
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This the 1st day of October, 1982.

Donald W. Stephens
Assistant Attorney General